

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
ROBERT ALLEN POOLEY,  
  
Defendant.

No. 2:21-CR-111 WBS

ORDER RE: MOTION FOR BAIL  
PENDING APPEAL

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Defendant has moved for release on bail pending appeal.  
(Docket No. 191.) The court held a hearing on the motion on  
November 12, 2024.

Under 18 U.S.C. § 3143(b)(1), the court may order the  
release of a convicted defendant pending appeal where the court  
finds:

- (A) by clear and convincing evidence that the person  
is not likely to flee or pose a danger to the  
safety of any other person or the community if  
released under section 3142(b) or (c) of this  
title; and

- 1 (B) that the appeal is not for the purpose of delay  
2 and raises a substantial question of law or fact  
3 likely to result in—
- 4 (i) reversal,
  - 5 (ii) an order for a new trial,
  - 6 (iii) a sentence that does not include a term of  
imprisonment, or
  - 7 (iv) a reduced sentence to a term of  
8 imprisonment less than the total of the time  
9 already served plus the expected duration of  
the appeal process.

10 The court finds by clear and convincing evidence, and  
11 the government agrees, that defendant is not likely to flee or to  
12 pose a danger to the safety of any other person or the community  
13 if released on bail pending appeal. See 18 U.S.C. §  
14 3143(b)(1)(A); United States v. Handy, 761 F.2d 1279, 1283 (9th  
15 Cir. 1985). The court further finds, and the government does not  
16 dispute, that defendant's appeal is not for the purpose of delay.  
17 See 18 U.S.C. § 3143(b)(1)(B).

18 The government disputes, however, whether defendant has  
19 raised a substantial question of law or fact likely to result in  
20 reversal or an order for a new trial, as required by §§  
21 3143(b)(1)(B)(i) and (ii), or a reduced sentence of imprisonment  
22 less than the total time already served plus the expected  
23 duration of the appeal process, as required by §  
24 3143(b)(1)(B)(iv).

25 As explained by the Ninth Circuit in United States v.  
26 Handy, 761 F.2d 1279, 1281-83 (9th Cir. 1985), a substantial  
27 question is one that is "fairly debatable" or "fairly doubtful."  
28 While a substantial question is "one of more substance than would

1 be necessary to a finding that it was not frivolous," the  
2 district court need not find that reversal "is more likely than  
3 not," as this would be "tantamount to requiring the district  
4 court to certify that it believes its ruling to be erroneous."  
5 Id. at 1280-83; see also id. at 1280 ("Congress did not intend to  
6 limit bail pending appeal to cases in which the defendant can  
7 demonstrate at the outset of appellate proceedings that the  
8 appeal will probably result in reversal or an order for a new  
9 trial."). In setting forth this interpretation of § 3143(b), the  
10 panel majority in Handy rejected the dissent's alternate  
11 interpretation that a substantial question must be "a close  
12 question or one that very well could be decided the other way."  
13 See id. at 1284 (cleaned up).


14           As the court found at the hearing, defendant has raised  
15 a substantial question on his claim that the five-level  
16 enhancement of § 2B1.1(b)(16)(A) should not have been applied in  
17 calculating his sentencing guidelines. Under § 3143(b), that  
18 would require the court to order the detention of defendant  
19 terminated after serving the likely amended sentence of eleven  
20 months if he is successful on that claim. Now, after considering  
21 the relevant portions of the trial transcript, under the standard  
22 set forth in Handy, the court finds that defendant has also  
23 raised substantial questions as to (1) whether there was  
24 sufficient evidence as to his wire fraud convictions under a  
25 fraud by omission theory, and (2) whether the court properly gave  
26 a jury instruction regarding fraud by omission, thus requiring  
27 the court to order defendant's release in accordance with §  
28 3142(b) or (c).

1           The court notes, and defendant concedes, that defendant  
2 did not object to the instruction regarding fraud by omission  
3 during the jury instruction conference. However, it may be  
4 fairly debated whether defendant preserved such an objection  
5 through his attorney's arguments on his Rule 29 motions, in which  
6 she argued that, even though she proposed the instruction on the  
7 theory of fraud by omission, that theory "shouldn't go to the  
8 jury at all" given the alleged lack of evidence on that theory.

9           The court does not find that either the sufficiency of  
10 the evidence or whether the court improperly gave a fraud by  
11 omission instruction are close questions. Nevertheless, it finds  
12 that such questions are fairly debatable under Handy. In this  
13 court's view, there was more than sufficient evidence to support  
14 the jury's verdict on counts two and three of the Indictment.  
15 But the question of defendant's guilt on those counts was fairly  
16 debated at trial and it is expected that it will be fairly  
17 debated again on appeal. Further, the court finds that if  
18 defendant is successful on either of these two issues on appeal,  
19 it will likely result in reversal or a new trial on the wire  
20 fraud counts. See 18 U.S.C. § 3143(b)(1)(B). Accordingly, the  
21 court will grant the motion for bail pending appeal.

22           IT IS THEREFORE ORDERED that defendant's motion for  
23 bail pending appeal (Docket No. 191) be, and the same hereby is,  
24 GRANTED. Defendant's conditions of release shall remain as  
25 previously set by the court.

26 Dated: November 14, 2024

  
27 WILLIAM B. SHUBB  
28 UNITED STATES DISTRICT JUDGE